CELLNET
CELLULAR SERVICE

EX PARTE OR LATE FILED

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December 18, 1997

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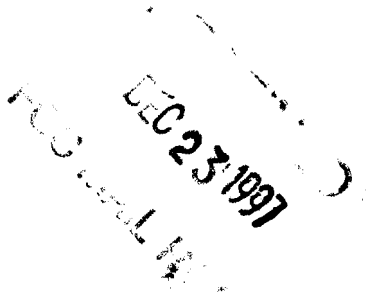

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, DC 20554

RE: Reply Comments to Petition for Reconsideration C-Block Financing Terms (WT Docket 97-82)

Dear Secretary Salas:

As a follow up to my meeting with the FCC on December 17, attached please find copies of the materials discussed in my meetings. Please add this letter and the enclosed materials to the record of the above mentioned docket.

The following summarizes the items discussed in my meeting with the Commission:

- PCS has fallen short of providing facilities based competition
- Resale is not being offered the large PCS carriers who are in service
- The C-Block promises entrepreneurial open access to their networks
- The Commission, at a minimum, should allow the C-Block licensees to fully utilize their down payments in the Disaggregation and Prepayment Options, as well as revise the Prepayment Option to reflect a net present value of the foregoing installment payments.

If you have any questions, please do not hesitate to call me. Thank you.

Sincerely,

Michael Tricarichi

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Enclosures

EX PARTE OR LATE FILED

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Westside Cellular, Inc. dba Cellnet,	)	
Complainant,	)	
v.	)	**Case No. 93-1758-TP-CSS**
GTE Mobilnet, Incorporated, et al.	)	
Respondents.	)	

NEW PAR'S MOTION TO DISMISS THE AMENDED COMPLAINT

Respondent New Par hereby moves the Commission to dismiss the Amended Complaint filed by Westside Cellular, Inc. dba Cellnet ("Cellnet") as to it for the reason there is no reasonable ground for the claims stated in the Amended Complaint. A memorandum in support is attached hereto.

Respondent New Par also moves the Commission to dismiss the Amended Complaint as to the following named Respondents: Cellular Communications, Inc.; Northern Ohio Cellular Telephone Company, aka Cellular Communications of Northern Ohio, aka Cellular One; Akron Cellular Telephone Company, aka Cellular Communications of Akron, aka Cellular One; Canton Cellular Telephone Company, aka Cellular Communications of Canton, aka Cellular One; Lorain/Elyria Cellular Telephone Company, aka Cellular Communications of Lorain/Elyria, aka Cellular One; Mansfield Cellular Telephone Company, aka Cellular Communications of Mansfield, aka Cellular One; Columbus Cellular

Telephone Company, aka Cellular Communications of Columbus, aka Cellular One; and PacTel Cellular of Ohio, Inc. As a result of an internal reorganization of New Par, approved by the Commission by Entry dated December 30, 1996 in Case No.96-1134-CT-AMR, none of the foregoing entities is a licensed telephone company subject to the Commission's jurisdiction, and New Par, dba AirTouch Cellular, is the sole remaining licensee in Ohio. Each of the foregoing entities, except PacTel Cellular of Ohio, Inc. was merged into New Par and liquidated as a result of the reorganization approved by the Commission on December 30, 1996.

Respectfully submitted,

Kathleen M. Trafford

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dba AirTouch Cellular

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

As required by Commission Rule 4901-9-01, New Par has tendered its answer to the Amended Complaint contemporaneously with the filing of this motion. In its Answer, New Par presents the pertinent facts to show that there is no reasonable factual ground for the claims asserted against it. In this motion, New Par shows that, in addition to the lack of any factual merit to Cellnet's claims against it, the Amended Complaint also fails to state any reasonable grounds for complaint as a matter of law. While the Amended Complaint is liberally sprinkled with allegations of discrimination and anticompetitive conduct, such allegations cannot survive any serious scrutiny. For the reasons set forth below, New Par urges the Commission to recognize this case for what it is -- an effort by one reseller to misuse the traditional regulatory structure designed to protect consumers in a monopolistic environment in order to advantage itself in the new competitive telecommunications environment. That was never a role this Commission was intended to play. *Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St. 2d 302, 307 (holding that Commission exists to be "the intermediary between the *citizen consumer* on the one side and the *public utility* on the other," and is not authorized to "balance the interests of a public utility . . . vis-a-vis its competitors in a complaint proceeding").

THERE IS NO REASONABLE GROUNDS FOR COUNT I OF THE AMENDED COMPLAINT BECAUSE THE COMMISSION HAS NEVER PROMULGATED ANY REQUIREMENT THAT CELLULAR PROVIDERS MAINTAIN SEPARATE WHOLESALE AND RETAIL OPERATIONS. 1

Count I of the Amended Complaint alleges that New Par is in violation of the Commission's order in Case No. 84-944-TP-COI, Opinion and Order (April 9, 1985)(the "944 Order"), and reaffirmed in Case No. 86-1144-TP-COI, Finding and Order (August 2, 1988)(the "1144 Order"), which Cellnet alleges requires Respondents to "maintain separate wholesale and retail operations." (Amended Complaint, ¶ 6). Cellnet alleges in Count I that Respondents do not maintain separate wholesale and retail operations and do not maintain accounting records for their wholesale functions separate and distinct from their retail functions. Cellnet also alleges that Respondents' operations are entirely interrelated. (Amended Complaint, ¶¶ 11-13). New Par denies each of these allegations in its Answer to the Amended Complaint. Separate and apart from its lack of factual merit, however, Count I of the Amended Count must be dismissed because the Commission has never required cellular service providers to maintain separate wholesale and retail operations, functions or accounting records.

Count I of the Amended Complaint is based upon a fundamental misunderstanding of the Commission's order in *In the Matter of the Commission Investigation Into the Regulatory Framework for Telecommunication Services in Ohio*, Case No. 84-944-TP-COI Opinion and Order (April 9, 1985)(the "944 Order"). The Commission's 944 Order did not establish any affirmative requirement that cellular service providers create and maintain separate wholesale

or retail operations. The 944 Order stated only that *if* a cellular service provider has an affiliated reseller, that affiliated reseller will not be considered a regulated "telephone company," provided that the affiliated reseller has no involvement in the wholesale operations of the underlying carrier and provided that affiliated reseller's operations are maintained under a separate set of accounting records from the operations of the underlying carrier. *See* 944 Order at p. 10 The Commission reconfirmed that it was not creating an affirmative requirement that all cellular service providers maintain separate wholesale and retail operations in its subsequent 563 Proceeding. *See In the Matter of the Commission Investigation Into the Implementation of Sections 4927.01 Through 4927.05, Revised Code, as They Relate to Competitive Telephone Services,* Case No. 89-563-TP-COI, Finding and Order, October 22, 1993 at pp. 21-22; Entry on Rehearing (December 22, 1993) at ¶ 4, and Appendix A, Guidelines for the Provision of Competitive Telecommunications Services, Section II.K.2.a. The Commission also clarified in its 563 Entry on Rehearing that it was not imposing a structural separation requirement on cellular providers. The Commission expressly amended the 563 Guidelines to make it clear that there was no prohibition against the sharing of employees between the wholesale and retail arms of a cellular telephone company. Case No. 89-563-TP-COI, Entry on Rehearing (December 22, 1993) at ¶ 4.[1]

[1]The Commission's determination not to require cellular service providers to establish separate wholesale and retail operations is consistent with the Federal Communication Commission's ("FCC's") policy in this regard. *See In the Matter of Petitions for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies,* Notice of Proposed Rule making and Order (March 21, 1991), 6 FCC Rcd 1719 at ¶ 55 ("We should also note that the Commission has never required cellular companies to establish separate wholesale and retail operations. In the same vein, the Commission's resale policy does not require that

Thus, even assuming that New Par does not maintain separate wholesale and retail operations, functions or accounting records, there still would be no reasonable grounds for Count I of the Complaint because New Par would not be in violation of any affirmative order or requirement of the Commission, and, therefore, could not be in violation of R. C. 4905.54.[2] Even if all the facts alleged by Cellnet were true (which they are not), the only consequence of those facts would be that New Par's retail operations would also become subject to the Commission's jurisdiction.

THERE IS NO REASONABLE GROUNDS FOR COUNT II AND PARAGRAPHS 20, 21 AND 23 OF COUNT III OF THE AMENDED COMPLAINT BECAUSE THE ALLEGATIONS CONTAINED IN THESE PARAGRAPHS FAIL TO STATE ANY CLAIM UNDER THE COMMISSION'S "AFFILIATED RESELLER" GUIDELINES.

Count II of the Amended Complaint alleges that Respondents discriminate against Cellnet by refusing to provide service to Cellnet at the same rates and subject to the same terms and conditions as their "affiliated resellers." Count III of the Amended Complaint alleges at paragraphs 20, 21 and 23 that Respondents provide their "affiliated resellers" with a

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carriers charge separate wholesale rates. We observe that some carriers have established wholesale rates, and we do not discourage such pricing, We only required that, at a minimum, no restrictions on resale be imposed."(footnotes omitted)); *In the Matter of the Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, First Report and Order (July 12, 1996) at ¶ 12(clarifying that the federal resale rule "does not require providers to structure their operations or offerings in any particular way, such as to promote resale, or adopt wholesale/retail business structures, or establish a margin for resellers or guarantee resellers a profit.").

[2]R. C. 4905.54 does not itself create any affirmative requirements for cellular service providers, it merely establishes a cause of action for alleged violations of Commission's orders or regulations.

number of non-rate related benefits (e.g. direct access to switches, interconnected landline network facilities, free access to numbers and airtime, billing services, equipment, trade name usage) but refuse to provide the same benefits to Cellnet. Cellnet alleges that by not offering service to unaffiliated resellers at the same rates, terms and conditions offered to affiliated resellers, and by not giving unaffiliated resellers all the non-rate benefits offered to affiliated resellers, Respondents are acting in violation of the 944 and 1144 Orders, R. C. 4905.22, 4905.33, 4905.35 and 4905.54, and some unidentified FCC orders. New Par denies each of these allegations in its Answer to the Amended Complaint. Separate and apart from their lack of factual merit, however, Count II and paragraphs 20, 21 and 23 of Count III of the Amended Count fail to establish any grounds for complaint against New Par because Cellnet is relying on an erroneous definition of the concept of an "affiliated reseller." [3]

For the purpose of Count II and paragraphs 20, 21 and 23, Cellnet is using the "affiliated reseller"concept to reference New Par's company-owned stores and New Par's authorized dealers or agents. *See* "Complainant's Responses and Objections to Interrogatories Propounded by [New Par]," Response to Interrogatories 16(b) and 18(a) (Copy attached.). Cellnet is asking the Commission to compare it to the New Par stores and authorized agents to determine if it is being charged for service at the same rates and terms as New Par charges its stores and agents or if New Par's own stores or agents receive any benefits that Cellnet

[3]To the extent that these allegations are premised on the rates charged for cellular service, as opposed to terms and conditions separate and apart from rates, they should be dismissed for the alternative reason that they are outside the scope of the Commission's jurisdiction for the reasons set forth *infra* at pp. 22-30.

does not receive. This is a meaningless comparison, however, because the "affiliated reseller" concept as used by the Commission in its 944 and 563 Orders, does not equate to New Par's company-owned stores or authorized agents.

Throughout its orders, the Commission has used the "affiliated reseller" concept to broadly distinguish between the facilities-based carriers' "wholesale" and "retail" operations. A facilities-based carrier's retail operations, as defined by the Commission, properly includes more than just its stores or authorized agents; it includes all the carrier's retail operations "which consist of marketing of cellular service as opposed to the actual provision of cellular service." *See* 944 Order at p. 10. *See also* Case No. 89-563-TP-COI, Entry, April 22, 1993, Appendix A, Staff's Recommendation In the 563 Docket ("[t]he staff believes that the Commission's statutory jurisdiction over cellular carriers extends to both wholesale and retail *operations* of such carriers, regardless of whether the retail *operations* (involving resale of the underlying carrier's cellular service) are separately conducted by an entity affiliated with the underlying carrier. Nevertheless, the staff recommends that the Commission should, at this time, subject to a few exceptions as described further below, not impose regulatory requirements on a CTS's provider's affiliated retail cellular *operations*.")(emphasis added); *In the Matter of the Application of Northern Ohio Cellular Telephone Company for a Certificate of Public Convenience and Necessity*, Case No. 84-687-RC-ACE, Entry, May 29, 1985(concluding that because ~~"the retail division of the applicant's business~~ will keep separate accounting records and will operate independently from the underlying carrier, on

the same terms as any non-affiliated reseller of the applicant's cellular services, *such retail division* will not be subject to Commission jurisdiction")(emphasis added).

Thus, the Commission has consistently equated the concept of "affiliated reseller" with the totality of the cellular carrier's retail operations or its retail division, not just the activities of its stores or its agents. Moreover, the Commission has repeatedly indicated that it will look at the carrier's accounting records, and specifically the allocation of expenses and revenue between its wholesale and retail operations, in order to identify the rates and terms under which wholesale service is being provided to the carrier's "affiliated reseller." 563 Finding and Order at p. 22.

The flaw in Cellnet's claim is that it fails to recognize the reality of how New Par's operations are structured. In the Commission's parlance, New Par's wholesale division "sells" service to unaffiliated resellers, such as Cellnet, and to its own retail division. New Par's retail division adds value to the service it obtains from its wholesale side, e.g. equipment, promotional incentives, advertising, customer service, etc., and sells such service to its subscribers either through its own sales centers or authorized agents. The sales centers and authorized agents are just components in the broader New Par retail distribution system. By focusing only on the New Par sales centers and authorized agents Cellnet erroneously ignores other significant components of New Par's retail operations and erroneously assumes that the all benefits afforded New Par sales centers or authorized agents are provided by the "underlying wholesale carrier."

Thus, because they are based on an erroneous understanding or application of the Commission's "affiliated reseller" guidelines, Count II and paragraphs 20, 21 and 23 of Count III of the Amended Complaint fail to state reasonable grounds for complaint against New Par. In essence what Cellnet is seeking is to have New Par provide it service on terms more favorable than it provides to its own retail operations. Cellnet wants to receive the value added benefits New Par provides through its retail operations without any cost to Cellnet. Cellnet wants New Par to subsidize Cellnet's retail sales, which New Par clearly is under no obligation to do. If Cellnet wants to buy service from New Par with all the value added benefits New Par provides through its retail operations, then Cellnet should buy service from New Par under a retail rate plan or promotion, which, as discussed below, it can do provided it qualifies for such service offerings on the same terms and conditions as New Par's retail customers. But what Cellnet cannot demand is that New Par sell it service at wholesale rates and also give it all the promotional benefits provided (and paid for) by New Par's retail operations.

we don't take it!

COUNT III, PARAGRAPH 22 OF THE AMENDED COMPLAINT MUST BE DISMISSED BECAUSE THIS COMMISSION HAS NO JURISDICTION OVER THE SALE OF EQUIPMENT AND HAS NEVER PROHIBITED CELLULAR SERVICE PROVIDERS FROM OFFERING FREE OR DISCOUNTED EQUIPMENT TO SUBSCRIBERS.

In paragraph 22 of the Amended Complaint, Cellnet alleges that the Respondents are unlawfully offering free or discounted equipment to their retail end-users at the time they obtain service but do not make the same "bundled" offerings available to it as a reseller.

Cellnet alleges that this practice violates the Commission's 944 and 1144 Orders, FCC orders and R. C. 4905.22, 4905.33, 4905.35 and 4905.54.

New Par has denied these allegations in its Answer to the Amended Complaint for the reason that New Par does offer free or discounted equipment to resellers on the same terms and conditions, and subject to the same qualifications, applicable to its retail subscribers. Indeed as noted in its Answer, on November 19, 1996, New Par clarified in a memorandum sent to all its resellers that New Par's retail rate plans and mass market promotions are available to resellers subject to the same terms, conditions, and qualifications that apply to end-users. That memorandum stated:

> Based upon questions that we have received from our Resellers, we would like to take this opportunity to clarify the AirTouch Cellular policy on Retail rate plans and Promotional offerings. As a reseller, you always have the option of purchasing any of our Retail rate plans or Mass Market Promotions, for which you qualify. Purchase of these plans may be completed through one of our Sales and Service Centers or Authorized Agent locations under the same Terms and Conditions as other customers.

New Par Answer at ¶14. Thus, there is no factual basis for Cellnet's "unlawful bundling of equipment and services" claims against New Par.

Separate and apart from its lack of factual merit, however, paragraph 22 of the Amended Count fails to establish any grounds for complaint against New Par for the alternative reasons that the statutes relied on by Cellnet do not govern the sale of equipment; the Commission has never asserted jurisdiction over the sale of equipment; the Commission has never prohibited the bundling of service and equipment; and there is a legitimate basis

for distinguishing between resellers and end-users with respect to the provision of free or discounted equipment.

The Commission has no jurisdiction over the sale or provision of equipment.

Cellnet's unlawful bundling claims has no support in the statutes of this State. Cellnet's reliance on R. C. 4905.22 and R. C. 4905.33 as the legal basis for its claim of unlawful bundling is clearly misplaced. Both statutes speak only to a utility's charges or rates for "service". R. C. 4905.22 requires that "[a]ll charges made or demanded for any service" be just and reasonable; the statute makes no reference whatsoever to equipment. R. C. 4905.33 regulates the compensation a utility may charge or receive "for any service" and prohibits the furnishing of "free service or service for less than actual cost for the purpose of destroying competition." R. C. 4905.33 does not empower the Commission to regulate equipment.[4] Similarly, R. C.4905.26 gives the Commission jurisdiction to entertain complaint proceedings only to the extent that such proceedings encompass complaints about service; the Commission has no jurisdiction under R.C. 4905.26 to entertain complaints about the sale of equipment. *Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St. 2d 302.

Moreover, to the extent that the plain meaning of these statutes could even arguably be stretched to extend to the regulation of equipment, any jurisdiction the Commission would

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[4]Cellnet's reliance on these two statutes is also entirely misplaced for the reason that the States' authority to regulate the "charges" or "compensation" a cellular service provider makes or receives for service, as well as the States' authority to prohibit the "furnishing of free service or service for less than actual cost", is preempted by federal law as discussed more fully *infra* at pp. 22-30.

have over equipment is nevertheless preempted by federal law. *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 FCC 2d 348 (1980), *aff'd*, 693 F. 2d 198 (1982), *cert. denied*, 461 U. S. 938 (1983)(specifically preempting the states' tariffing and regulation of the provision of customer premises equipment); *Cellular Communications Systems (Cellular Report and Order)*, 86 FCC 2d 469, 497, n. 65 (1981) (applying policies adopted in the Second Computer Inquiry to cellular telephone equipment); *In the Matter of the Implementation of FCC's Orders With Respect to Detariffing of Paging and Conventional Mobile Premises Equipment*, Case No. 84-1189-RC-UNC, Finding and Order (November, 1984).

Cellnet, in fact, advocated this precise point of law in a prior proceeding. In *Westside Cellular, Inc. d/b/a Cellnet v. Northern Ohio Cellular Telephone Company*, 100 Ohio App. 3d 768, (1995), Cellnet argued that because the FCC had preempted this Commission's authority over equipment, the state court should hear its complaints about equipment. The Cuyahoga County Court of Appeals agreed with Cellnet as to the first point, although it correctly disagreed with Cellnet as to the jurisdiction of the state courts. The Court of Appeals held:

> In 1987, the FCC defined cellular telephones as "customer premises equipment" and prohibited state regulatory agencies from exercising any control over that equipment. Thus, although the commission has sole jurisdiction under state law to hear the complaint [concerning equipment], it lacks jurisdiction to do so under federal mandate.

100 Ohio App. 3d at 772. Thus because Cellnet advocated in a prior judicial proceeding that this Commission had no jurisdiction over equipment, it is estopped from attempting to relitigate this same issue in this proceeding, and it most certainly cannot advocate an inconsistent position in this proceeding.

Cellnet was wrong

The Commission has never prohibited cellular service providers from offering free or discounted equipment as part of a promotional offering.

Separate and apart from any question as to whether the Commission has jurisdiction to regulate equipment is the fact that the Commission has never issued any order regarding the bundling of equipment or service or stated any prohibition against the use of free or discounted equipment in promotional offerings by cellular providers. Nor has the Commission ever ruled or intimated that the provision of free or discounted equipment to end-users is unlawful if the same promotional offerings are not made available to resellers as well. Indeed in its December 22, 1993 Entry on Rehearing in Case No. 89-563-TP-COI, the Commission expressly clarified that: "The Commission is in no way asserting or exercising jurisdiction over either the provision or sale of cellular equipment under Section II (K) (2) of the 563 guidelines, but rather is only concerned with ensuring that service is provided on a non-discriminatory basis." *Id.* at ¶ 7.

The Commission's decision not to restrict the provision of equipment to end users, either separately or on a bundled basis, is the proper decision and should be maintained. The provision of free or discounted equipment to potential subscribers is a common and generally accepted practice in the cellular industry. While the FCC initially prohibited this practice,

Second Computer Inquiry, 77 FCC 2d 345 at 140-160, it changed its policy in 1992 to expressly allow the bundling of equipment and service by cellular providers, provided that service is also offered separately at a nondiscriminatory price. *In the Matter of Bundling of Cellular Customer Premise Equipment and Cellular Service,* 7 FCC Rcd 4028 (May 14, 1992). The FCC changed its policy because it recognized that the "public interest benefits associated with bundling in the cellular market outweigh the potential for anticompetitive harm." *Id* at par.7. In making this change, the FCC expressly rejected an argument by resellers that allowing carriers to offer equipment and service on a bundled basis would drive resellers out of business because they would be unable to compete for subscribers. *Id.* at pars. 27-28.

The Commission too should continue to allow cellular providers to offer equipment and service to subscribers on a bundled basis because the practice furthers the salutary purposes of reducing the greatest barrier to the entry of new customers in the cellular market and, thereby, spreading the fixed costs of cellular service over a larger population of users. It is a practice that furthers the goal of universal availability and affordability of cellular service and thus promotes the continued growth of the industry and the public interest. The prohibition or restriction of this practice clearly would not be in the interest of consumers. The prohibition or restriction of this practice at this time would also undermine the ability of Ohio cellular providers to compete in an increasingly competitive environment and could negatively impact the conversion to digital. *Id.* 7 FCC Rcd at ¶ 20. Any decision by this Commission to now restrict the practice of offering free or discounted equipment to

subscribers to promote the sale of cellular service could have ramifications reaching far beyond the scope of this complaint case. It could place Ohio cellular providers and Ohio cellular consumers at a distinct disadvantage in a increasingly competitive market.

There is a legitimate basis for distinguishing between resellers and end-users with respect to the provision of free or discounted equipment.

The third statute relied on by Cellnet for Count III of the Complaint is R. C. 4905.35. Cellnet erroneously reads this statute to require that cellular providers treat resellers exactly the same as end-user customers. That is not what the statute requires. The statute prohibits only "undue or unreasonable" preferences or "undue or unreasonable" disadvantages. Public utilities have always been allowed to distinguish among the products and services they offer to customers who are not similarly situated. *Allnet Communications Serv. Inc. v. Pub. Util. Comm.* (1994), 70 Ohio St. 3d 202; *County Commissioners Ass'n of Ohio v. Pub. Util. Comm.* (1980), 63 Ohio St. 2d 243; *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1975), 42 Ohio St. 2d 403, *cert. denied*, 423 U.S. 986; *Buckeye Lake Chamber of Commerce v. Pub. Util Comm.* (1954), 161 Ohio St. 306. Thus, even if it were true that New Par was refusing to offer resellers the same equipment promotions it makes available to its own end-users (which is not the case at all), there would still be no violation of R. C. 4905.35 because such preference for end-user customers would not be an undue or unreasonable preference.

There is a fundamental difference between retail sales and sales to resellers that has particular significance to the cellular provider's decision to offer free or discounted equipment as an inducement to buy service. In a retail sale the ultimate consumer (the end-

user) has a direct and usually exclusive relationship with the cellular provider. It sees itself as the provider's customer. Even after the relationship is established, the customer continues to receive promotional materials, communications, and services directly from the provider which are designed to build brand loyalty and to promote the use of cellular service by the customer. The provider is, therefore, able to influence how much service the customer uses and to foster a long term relationship with that customer. This expectation of future and possibly increased service is very significant to the decision to offer customers free or discounted equipment at the front end because the cellular provider naturally wants to have the opportunity to recover this promotional cost through the compensation it receives for service over a longer period of time.

These necessary elements are lacking in a reseller situation. When a cellular carrier sells to a reseller, it loses the opportunity to interact with the ultimate end-user to build long term loyalty and has little, if any, opportunity to influence the customer's level of usage. Also, resellers do not have an exclusive relationship with only one carrier. A reseller, therefore, could take free or discounted equipment from one provider and use it to attract new customers to whom it could then resell the service of another provider, thereby, effectively preventing the first carrier from successfully recouping the cost of the equipment through the sale of its service.

In addition, the policy reasons that initially justified the prohibition against restrictions on the resale of service are not at all applicable to the sale of equipment. The FCC early on determined that restrictions on the resale of service would impede growth and

competition in the cellular industry due to the duopolistic cellular licensing system. There is no similar concern with respect to equipment. Resellers can buy equipment on the open market just the same as the providers. Their access to equipment is not in any way limited, as is their access to service. Resellers can also package equipment in their own promotional offerings, which they can offer to the public in direct competition with the cellular providers. Thus, cellular equipment, unlike cellular service, is a fully competitive product and is not a proper subject for public regulation. *Dayton Communications Corp. v. Pub. Util. Comm.*, 64 Ohio St. 2d at 306.

The flaw in Cellnet's theory that offering free or discounted equipment to end-users but not resellers constitutes an undue or unreasonable preference is that the theory fails to recognize that a reseller is not similarly situated to an end-user. A reseller is not only the cellular provider's customer; it is also its competitor. Resellers and providers compete for the same end-user customers. There is, therefore, a very legitimate reason why a cellular provider may be unwilling to use its promotional budget to promote sales by a reseller in direct competition with its own direct sales force and authorized agents. A cellular carrier's desire to use promotional offerings, some of which may include equipment, to build and support its own distribution system is not an undue or unreasonable preference. *In the Matter of Bundling of Cellular Customer Premises Equipment and Cellular Service*, 7 FCC Rcd 4028, Report and Order (June 10, 1992).[5]

[5] In addressing this precise issue, the FCC concluded:

THERE IS NO REASONABLE GROUNDS FOR COUNT IV OF THE AMENDED COMPLAINT BECAUSE THE CROSS SUBSIDIZATION OF ONE COMPETITIVE SERVICE OR PRODUCT WITH ANOTHER IS NOT PROHIBITED BY ANY STATUTE OR ORDER REGULATING COMPETITIVE TELEPHONE SERVICE IN OHIO.

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Count IV of the Amended Complaint alleges that Respondents "cross-subsidize" their retail operations with profits generated by their wholesale function for the purpose of destroying competition and providing service to the public at an amount lower than cost. Cellnet alleges that such practices violate R.C. 4905.22, 4905.33 and 4905.35. (Amended Complaint, ¶'s 26 - 28). New Par has denied these allegations in its Answer. The Commission need not, however, conduct a hearing to resolve this factual dispute because, even if it were true that New Par is cross-subsidizing its retail operations with its wholesale sales, such practice does not violate the cited statutes or any order of this Commission.

As noted previously, neither the Commission nor the FCC requires cellular carriers to

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> "We agree with the FTC Staff and DOJ that the most efficient government policy is to allow firms the ability to choose how to distribute their own products. Thus, to the extent that elimination of the bundling prohibition allows facilities-based carriers to utilize their preferred distribution systems more intensively, and to the extent that resellers are not part of the facilities-based cellular carriers' preferred retail distribution system, resellers may not benefit from the elimination of the bundling prohibition. Nevertheless, the possibility that one type of retailer may be harmed does not provide the basis for a rule that limits the use of a potentially efficient contract or retail distribution system. . . . Moreover, the DOJ further explains that since resellers will remain able to obtain CPE to offer their customers together with service, the sole effect of allowing carriers to bundle will be to put resellers in the same position that any distributor faces when its supplier engages in dual distribution. We agree with the DOJ that "such dual distribution does not, in itself, raise anticompetitive effects."

Id. at ¶ 28 (footnotes omitted).

create and maintain separate wholesale and retail operations. There is no requirement that cellular carriers offer "wholesale" rates; or separately track their wholesale costs or revenues. Because there is no legal requirement that wholesale and retail operations be segregated, there can be no prohibition against the cross-subsidization of "wholesale" service by "retail" sales or "retail" service by "wholesale" sales.

The concept of cross-subsidization is simply inapplicable in the context in which Cellnet is trying to make this claim. "Cross-subsidization" is prohibited when a carrier uses services that are not competitive to subsidize services that are subject to competition. *See e.g.* 47 U.S.C. § 254(k)("A telecommunications carrier may not use services that are not competitive to subsidize services that are competitive."); *Computer and Communications Industry Ass'n v. F.C.C.*, 693 F. 2d 198, 205, n. 25 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); *Aeronautical Radio Inc. v. F.C.C.*, 642 F. 2d 1221, 1231, n. 14 (D.C. Cir. 1980), *cert. denied* 451 U.S. 920 (1981); *In the Matter of the Application of Centel Network Communications, Inc. for Authority to Furnish Inter-exchange Telecommunications Services and Operator Services*, Case 89-1800-TP-ACE, Entry (March 16, 1990); *In the Matter of the Commission Investigation into the Resale and Sharing of Local Exchange Telephone Services*, Case No. 85-1199-TP-COI, Opinion and Order (August 19, 1986), at pp. 14-15., Entry on Rehearing (October 4, 1986) at ¶8. Such cross subsidization is considered to be anticompetitive because it forces the captive customers of the noncompetitive service to subsidize other aspects of the carriers' business and because it gives the carrier an unfair advantage over its competitors with respect to the offering of the competitive service. Cross-

subsidization, however, has never been prohibited as a practice in connection with competitive services.

In this instance, all the service being provided is competitive service. In its 563 Finding and Order, the Commission expressly found that services provisioned by the underlying wholesale carrier to its non-utility resale customers, as well as services provisioned to end-users, was "competitive telephone service." The Commission, therefore, did not order cellular carrier to create and maintain separate wholesale and retail structures, functions or records, as it has done in cases where it does have concerns about the possible cross subsidization of competitive services by noncompetitive services. *See e.g. In the Matter of the Application of Arcadia Telephone Company for Alternative Regulation of Paging Services*, Case No. 94-1862-TP-UNC Finding and Order (March 9, 1995)(requiring separate operations and recordkeeping between Arcadia's competitive paging services and noncompetitive local exchange services); *In United Telephone Long Distance, Inc.*, Case No. 86-2173-TP-ACE, Finding and Order (December 7, 1988)(requiring structurally separate operations to ensure against cross-subsidization of long distance service by local exchange service).

The cellular wholesale market has become increasingly competitive since the Commission promulgated the 563 Guidelines in 1993. Cellular providers compete not only among themselves, they compete with a growing number of resellers, with paging companies, with specialized mobile radio carriers, and most recently with personal communications services providers. Thus, because the cellular market is a competitive

market at both the wholesale and retail levels, there is no grounds for a complaint that Respondents are cross-subsidizing their retail operations with their wholesale sales. This is particularly true in the case of New Par because New Par has made it clear to all resellers that New Par does not restrict the resale of any of its service offerings and that resellers can purchase service from New Par under any rate plan or promotional offering for which it qualifies on the same terms and conditions as any end-user customer. (New Par Answer at ¶14).

5

THE COMMISSION HAS NO JURISDICTION TO PROCEED TO HEARING ON THE AMENDED COMPLAINT BECAUSE IT SEEKS TO HAVE THE COMMISSION REGULATE THE RATES CHARGED FOR SERVICE.

While Cellnet has sought to assert various different theories in the various counts of the Amended Complaint, there is no real doubt that what Cellnet is complaining about is the rates it is charged by Respondents. Cellnet's lack of separation and cross subsidization allegations in Counts I and IV of the Amended Complaint are there solely because Cellnet also contends that the alleged lack of separation between wholesale and retail and the alleged cross subsidization are affecting the rates it is charged. Cellnet's allegations in Count II and III about non-rate benefits to affiliated resellers and equipment promotions to end-users are there solely because Cellnet believes such non-rate benefits reduce the cost of service and result in higher rates paid by Cellnet.[6]

[6]If the Commission has any doubt as to the real meaning and significance of the allegations in Counts I through IV, it need only refer back to the "Clarification" Cellnet filed back at the start of this case when asked to better explain what it was really seeking in this action. Cellnet described the significance of Counts I and IV as follows:

Counts V, VI and VII of the Amended Complaint, however, contain no semblance of disguise; in these counts Cellnet cannot hide the fact that it is complaining about the rates being charged by Respondents. In Count V of the Amended Complaint Cellnet contends that the Respondents charge their retail customers lower rates for service than they charge Cellnet. In Count VI of the Amended Complaint Cellnet complains that New Par charges it a higher roaming rate than the rate paid by its other customers. Count VII complains that New Par increased its roaming rate without filing for an increase in rates pursuant to R.C. 4905.18.

> Lack of separation of wholesale and retail operations has resulted in the cross-subsidization of each of Cellular One Companies, New Par Companies, GTE and Ameritech's respective retail operations. This **cross-subsidization has allowed the Respondents to set their wholesale rates artificially high**, which effectively prevents Cellnet from competing for retail customers, because Cellnet's operations must rely solely on **the margin between the rates Cellnet charges its retail customers** (which must be competitive with those charged by Respondents' retail operations) and **what Cellnet must pay Respondents** for its service on a wholesale basis.

See "Complainant, Westside Cellular Inc. d/b/a Cellnet's Clarification in Response to Commission Inquiry," (filed May 17, 1994) pp. 15-16 (emphasis added). When asked to clarify what it meant by the allegations now contained in Counts II and III of the Amended Complaint, Cellnet had this to say:

> Counts 2 and 4 of the instant complaint case, like counts 1 and 3, are closely interrelated. Count 2 states that the Respondents are **providing cellular service to their own retail operations at rates which are lower than the rates** they are providing (or willing to provide) to Cellnet. This conduct belies only two possibilities. Either Respondents' retail affiliates are **paying substantially less** than Cellnet for wholesale cellular service, and thus are able to provide service to end users at **rates lower than Cellnet's cost** and still make **a profit on those services**, which would be violative of Ohio Rev. Code §4905.35, or Respondents' retail operations are **selling services for less than cost**, which conduct has as its intent, the destruction of competition in violation of Ohio Rev. Code § 4905.33.

Id. Clarification at p. 20.

New Par denies these allegations in its Answer. New Par states in its Answer that, while it does offer numerous different rate plans and promotional offerings for service that differ in the rates charged for service or roaming, and while it does offer certain plans and promotions specifically intended and designed for resellers, it does not restrict resale under any of its rate plans or promotional offerings. Cellnet, as a reseller, can buy service from New Par under any rate plan or promotional offering, for which it qualifies on the same terms and conditions as any other customer. (New Par Answer, ¶ 14). Thus, with respect to New Par, there is no merit to the allegations in Count V, VI and VII of the Amended Complaint. Separate and apart from their lack of merit, however, the allegations in Count V, VI and VII of the Amended Complaint, as well as the allegations in Count I through IV, seek to have the Commission regulate the rates charged by Respondents and are, therefore, beyond the scope of the Commission's lawful jurisdiction.

As a result of the Sixth Circuit's decision that the federal district court should have abstained in *GTE Mobilnet, et al. v. David W, Johnson, et. al.*, and not decided the question of the effect of 47 U.S.C. §332(c)(3)(A) on the Commission's jurisdiction over this complaint proceeding, the question of whether that federal statute preempts the Commission's authority to hear this case now must be decided by this Commission. *GTE Mobilnet. v. Johnson*, 111 F. 3d 469 (6th Cir. 1997), *reh'g and reh'g en banc denied*, 1997 U.S. App. LEXIS (May 28, 1997)[7] The dispositive issue, as now well-honed as a result of the prior pleading in this case

[7]It is clear that the Sixth Circuit did not decide this issue on the merits. It merely held that because the preemption claim is not "facially conclusive," abstention principles applied.